(3) Mar. 26, 2007

No. 06-1122

In The

Supreme Court of the United States

SEMINOLE ENTERTAINMENT, INC.,
d/b/a, RACHEL'S GENTLEMEN'S CLUB,

Petitioner,

vs.

CITY OF CASSELBERRY, FLORIDA,

Respondent.

On Petition For A Writ Of Certiorari To The Florida Fifth District Court Of Appeal

PETITIONER'S REPLY BRIEF

STEVEN G. MASON, ESQ.
Counsel of Record
STEVEN G. MASON, P.A.
1643 Hillcrest Street
Orlando, FL 32803
(407) 895-6767
(407) 895-2090

Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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CORRECTION TO FACTS

The city states that the authorities obtained evidence that Rachel's management was permitting prostitution, etcetera (City's brief at pages 1-2). In contrast, the appellate court found that arguably Rachel's key management personnel had no knowledge of this activity. See *Seminole Entertainment, Inc. v. City of Casselberry*, 811 So.2d 693, 695 (Fla. 5th DCA 2001).

Further along in its brief the city states that the federal district court found that Rachel's federal claims (raised here) were barred by *res judicata*.

> [t]he federal district court's assessment that Rachel's federal claims are barred by res judicata stands.

(City's brief at page 7).

> Interestingly, Rachel's was attempting to use the state court to litigate federal claims, after the Florida Middle District Court had previously told Rachel's it was procedurally barred from bringing an action *in federal court* regarding this matter.

(City's brief at pages 9-10) (Emphasis added).

Had the city left out the words "in federal court" the statement would be false. Instead, by including those three words, the city's statement is misleading. The federal court found that Rachel's was required to raise its federal claims *in state court* because Rachel's other action was pending there.

> In the state court proceedings, the circuit court had jurisdiction to consider **any attack** by Rachel's,

> constitutional or otherwise, to the revocation hearing or the revocation order in the certiorari petition, as well as any as-applied attack on the ordinance. (Note omitted). However, any facial attack on the constitutionality of the ordinance should have been brought in the declaratory judgment action. Also, a claim under 42 U.S.C. §1983 may be brought in state court. (Citations omitted). Accordingly, the circuit court[1] had jurisdiction to decide both actions brought by Rachel's, **as well as the claims asserted in this suit.** (Citation omitted).

Koziara v. City of Casselberry, 347 F.Supp. 2d 1223, 1257 (M.D. Fla. 2003).

After the state appellate court reversed the entry of [the first] summary judgment against Rachel's as reported in *Seminole Entertainment, Inc. v. City of Casselberry*, 866 So.2d 1242 (Fla. 5th DCA 2004), Rachel's moved to amend its lawsuit raising the instant federal claims (as alluded to and referenced in the federal decision). Rachel's motion to amend was granted, and Casselberry did not appeal that order.

In its [second] order of summary judgment the state trial judge also rejected Casselberry's *res judicata* argument based on the federal decision.

> The federal action, dismissed on the basis of *res judicata*, has little bearing on this case. As pointed out in the defendant's motion, the first prong of the test for *res judicata* is that there must be a final judgment on the merits (citation omitted). **The federal decision was not made**

[1] Referring to the state court.

> **on its merits**; the 42 U.S.C. §1983 claim was denied on procedural grounds. Therefore, this state claim cannot be dismissed on the basis of *res judicata*, as there has never been a determination of this particular claim on its merits.

Appendix B to Rachel's Petition at page 4a (Emphasis added).

Accordingly, the city's inference that the federal court determined Rachel's claims were barred as a matter of *res judicata* is nothing more than a red herring.

THE COURT IS NOT FORECLOSED FROM ACCEPTING REVIEW FROM A "PCA" – *MICHIGAN v. LONG*

The city makes two interesting statements at page twelve. First, Casselberry notes that Rachel's is asking this court to review a per curium affirmance (PCA), which does not provide any discussion or citation of authority. In Florida, a PCA forecloses further appellate review with the Florida Supreme Court. See generally, Art. V, Section 3(b), Fla. Const. However, this court's jurisdiction is not effected by same. For instance, see *Corona v. Florida*, 541 U.S. 930 (2004), where this court granted Corona's petition vacating a PCA issued by the Florida Fifth District Court of Appeal – the same court that issued the PCA in this case.

Second, the city states that it is impossible to determine if the Fifth District ruled upon Rachel's case on the merits of the United States constitutional claims or as a matter of state procedural law (City's brief at page 12). This is important because under these circumstances and pursuant to *Michigan v. Long*, 463 U.S. 1032, 1041-1042

(1983), this court should presume that the matter was decided under federal law.

At a minimum, this court should consider a remand to the state appellate court for an explanation as to how this politically-charged and tumultuous case was decided. *Michigan v. Long*, 463 U.S. 1032, 1041 (1983) [important that ambiguous adjudications by state courts do no stand as barriers to determination of federal question]; *Capital Cities Media, Inc. v. Toole*, 466 U.S. 378 (1984) [court may remand case to state court for clarification as to basis for lower court decision].

THERE IS NO DISPUTE - THE CITY'S CODE IS STRICT LIABILITY

On many occasions this court has accepted review over cases deemed important enough to merit attention. This is such a case. The city's code provides that an adult entertainment license can be suspended based upon employee misconduct – conduct that is automatically imputed to ownership. Rather than defending its code before this court, the city is silent on the subject. Yet it conceded this point before the state appellate court.

> Therefore, under Section 14-70 of Casselberry's City Code, **the owner is imputed** to have knowledge of the criminal activity if the manager or doorman whom the owner leaves in control of the business has knowledge of the criminal activity.

City's Answer Brief filed with the Fifth District Court of Appeal at p. 46.

* * *

> Thus, under the Casselberry code, **any individual who qualifies as a "licensee," which is defined to include owners, operators, and workers**, who knowingly permits sale of controlled substances, prostitution, or other specified prohibited sex acts to occur on the premises, **exposes the establishment to license revocation proceedings.**

City's Answer Brief filed with the Fifth District Court of Appeal at p. 39.

The only argument the city advances is that (as a matter of due process) Florida law provides that a license cannot be suspended unless it is established that the owner had knowledge of wrongdoing or was culpably responsible for same due to a lack of due diligence. See *Pic N' Sav v. Department of Business Regulation*, 601 So.2d 245, 250 (Fla. 1st DCA 1992). See also, *In the Matter of the Revocation of County Beverage License,* 1980 OK 183 (OK 1980).

The problem is that Casselberry's code does not address the culpable conduct of an owner; rather, it holds ownership automatically responsible for bad acts committed by any worker at the establishment (regardless of the worker's position, e.g., janitor, disc jockey, waitress, entertainer, et cetera). In other words, an extremely valuable property right can be taken simply because a worker violates the law – regardless of the steps an owner takes to train his workers and monitor the premises.

Rachel's respectfully requests that the court accept review over this important case.

Respectfully submitted this 26th day of March, 2007.

STEVEN G. MASON, ESQ.
Counsel of Record
STEVEN G. MASON, P.A.
1643 Hillcrest Street
Orlando, FL 32803
(407) 895-6767
(407) 895-2090

Attorney for Petitioner